

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 20, 2004

RAYMOND RUTTER v. H. GREELEY WELLS, JR.

Appeal from the Chancery Court for Sullivan County
No. C0016455 Richard E. Ladd, Chancellor

No. E2003-02741-COA-R3-CV - FILED SEPTEMBER 27, 2004

This case was brought under the Tennessee Public Records Act, Tenn. Code Ann. § 10-7-501, *et seq.* (1999 and Supp. 2003) (“the Act”). The trial court granted the respondent’s motion to dismiss because it found that the petitioner, a prisoner in state custody, had failed to comply with the court’s earlier order requiring the petitioner “to identify the exact documents to be copied.” The petitioner appeals. We vacate the trial court’s judgment and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Vacated; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Raymond Rutter, appellant, Mountain City, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter, and Michael A. Meyer, Assistant Attorney General, Nashville, Tennessee, for the appellee, H. Greeley Wells, Jr.

OPINION

I.

By letter dated September 11, 2002, Raymond Rutter (“the petitioner”) requested H. Greeley Wells, Jr., District Attorney General for the Second Judicial District of Tennessee (“the respondent”), to provide him “with a copy of the complete case file” pertaining to five criminal cases, in each of which the petitioner is the named defendant. By letter dated September 16, 2002, the respondent denied the petitioner’s request because, in the language of the letter, “[y]our request does not fall within the statutory requirements” of the Act.

On December 19, 2002, the petitioner filed his “Petition for Access to Public Records” in the trial court. The respondent moved to dismiss the petition on January 24, 2003. The respondent’s

motion was filed pursuant to Tenn. R. Civ. P. 12.02. In addition to another ground which is not presently before us on this appeal, the motion is based upon the assertion that “current Tennessee law does not require an official to copy records and deliver them to a requesting citizen.”

The trial court disagreed and entered an order on May 28, 2003, holding that “Tennessee law requires an official to copy records and to deliver them to a requesting citizen when the requesting citizen is incarcerated.” The order then recites the following:

The Court further finds, however, that the petitioner must amend the petition to identify the exact documents to be copied, as the respondent is not under a duty to search the records for the petitioner.

The order goes on to recite that the ground of the motion “relating to officials’ duties as to prisoners’ public record requests” is “overruled.” The order reserves the issue of whether the “particular documents” to be identified by the petitioner “are subject to . . . production” under the Act.

On July 16, 2003, the petitioner filed an “Amended Petition for Access to Public Records Pursuant to Court Order.” In response to the trial court’s order, the petitioner identified the following material for production under the Act: “arrest warrants; affidavits of complaint; indictments or informations; bill of particulars; plea bargains; judgments; witness statements; memoranda; correspondence; contracts; agreements; notes; studies; analysis; reports; bulletins; charts; working papers; accounting papers; and/or, any other printed or written matter together with all attachments, enclosures or exhibits thereto, prepared by, for or in the possession, custody or control of the [r]espondent.” (Capitalization and letter designation of each item in original omitted).

The respondent replied to the petitioner’s amended petition by filing a new motion to dismiss. In addition to re-alleging the bases of his original motion to dismiss, the respondent relied upon the following grounds:

The request for records is in a form that requires a search by [r]espondent. Such does not comply with the Court’s order for an amended petition and **Waller v. Bryan**, 16 S.W.3d 770, 773 (Tenn. App. 1999) *p.t.a. denied* (Tenn. 2000).

Much of the requested material may be privileged as attorney work product or otherwise privileged.

(Numbering in original omitted). By order entered October 29, 2003, the trial court granted the respondent’s motion because “the petitioner has not complied with the order entered May 28, 2003.” The trial court also denied the petitioner’s motion for summary judgment.

The petitioner appeals, contending that the trial court erred in ordering him to amend his petition; in dismissing his case; and in failing to grant his motion for summary judgment. The

respondent takes the position that the trial court correctly ruled with respect to each of the “errors” raised by the petitioner. In addition, the respondent contends that the trial court erred in holding that the Act requires “custodians to copy and send records to inmates.”

II.

Before considering the petitioner’s issues, we will address the respondent’s contention that the trial court should have dismissed the petition and the amended petition, because, in the words of the respondent, the Act “does not require custodians [of public records] to copy and send records to inmates.”

In effect, the respondent asks us to depart from and overrule our decision in the case of **Waller v. Bryan**, 16 S.W.3d 770 (Tenn. Ct. App. 1999). In an opinion released by us on September 20, 2004, we declined to modify our holding in **Waller**. See **Jones v. Crumley**, C/A No. E2003-01598-COA-R3-CV, 2004 WL 2086330 (Tenn. Ct. App. E.S., filed September 20, 2004). We again state our adherence to **Waller** and, as pertinent to the issue now before us, the following holding of that case:

If a citizen can sufficiently identify the documents which he wishes to obtain copies of so as to enable the custodian of the records to know which documents are to be copied, the citizen’s personal presence before the record custodian is not required. However, the records custodian is not required under the Public Records Act to make the inspection for the citizen requesting the documents. The citizen, to be able to obtain copies of those documents without making a personal inspection, must sufficiently identify those documents so that the records custodian can produce and copy those documents without the requirement of a search by the records custodian. The records custodian can require a charge or fee per copy that will cover both the costs of producing the copies and delivering the copies. It is the opinion of this Court that such was the intent of the Legislature.

Id. at 774. The respondent’s separate issue is found to be without merit.

III.

A citizen’s request for access to governmental records is controlled by the Act. **Memphis Publ’g Co. v. Cherokee Children & Family Servs., Inc.**, 87 S.W.3d 67, 74 (Tenn. 2002); **Cole v. Campbell**, 968 S.W.2d 274, 275 (Tenn. 1998). A convicted felon has a citizen’s right of access. **Cole**, 968 S.W.2d at 276-77. Inspection is addressed in Tenn. Code Ann. § 10-7-503(a) (Supp. 2003), which provides, in pertinent part, as follows:

. . . all state, county and municipal records . . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

Under the Act, “if unable to appear in person, the citizen may identify those documents sought by mail to the records custodian so that the records custodian can copy and produce those documents without requiring an extensive search.” *Hickman v. Tenn. Bd. of Prob. and Parole*, C/A No. M2001-02346-COA-R3-CV, 2003 WL 724474, at *3 (Tenn. Ct. App. M.S., filed March 4, 2003). If access is denied by the records custodian, the Act grants the requesting citizen judicial review. Tenn. Code Ann. § 10-7-505(a) (1999). “The burden of proof for justification of nondisclosure” is upon the records custodian. Tenn. Code Ann. § 10-7-505(c) (1999). The section of the Act dealing with judicial review of denials of access must be “broadly construed so as to give the fullest possible public access to public records.” Tenn. Code Ann. § 10-7-505(d) (1999).

Confidential records – being “any public record which has been designated confidential by statute,” *see* Tenn. Code Ann. § 10-7-301(2) (Supp. 2003) – are not subject to disclosure under the Act. The burden is on the records custodian to show why a request for documents should not be granted. Tenn. Code Ann. § 10-7-505(b) (1999). Thus, if a records custodian asserts the confidential nature of documents as a basis for not producing them, he or she must show that the subject document is confidential.

IV.

As we perceive the specific issue in this case, it is as follows: When a citizen requests access to a complete file pertaining to a criminal case, has the citizen framed his request in a manner that “sufficiently identif[ies] those documents so that the records custodian can produce and copy those documents without the requirement of a search by the records custodian”? *See Waller*, 16 S.W.3d at 774.

It is clear to us that there is no doubt regarding the material to which the petitioner seeks access. He wants to see the *complete* file on each of five criminal cases involving him as a defendant. If an individual presented himself or herself at the office of the respondent “during business hours” – say, for example, a media person – and requested access to a criminal court file on a closed case, is there any doubt that such a person would be entitled to view the complete file, with the exception of those portions of the file considered confidential under state statute? The answer is clearly no. This inmate – who cannot be there in person – has the exact same right. *Cole*, 968 S.W.2d at 276-77; *Waller*, 16 S.W.3d at 773-74.

We recognize that the records custodian will have to copy the complete non-confidential file for the petitioner in order to permit him access to the file; but the *handling* of the file for the purpose of copying it is not a “search” of the file as that concept is addressed in *Waller*. *Id.* at 774. We

further recognize that the records custodian is put to an expensive time-consuming exercise which would not be present with respect to an individual who appears in person; but this is an effort and expense that is required by the public policy of this state as established by the Legislature. It should be noted, however, that the records custodian “can require [one who cannot appear in person] to pay in *advance* the reasonable costs of producing or delivering copies of the records.” *Hickman*, 2003 WL 724474, at *12 (emphasis added).

In the instant case, the respondent has raised a very general claim that “[m]uch of the requested material *may* be privileged as attorney work product or otherwise privileged.” Such a *general* claim of confidentiality is not sufficient. *Id.*, at * 7. If the respondent is going to rely on a defense of confidentiality, he must identify those portions of the petitioner’s request “which would require disclosure of confidential records.” *Id.*, at *11. We recognize that this may require the respondent to review the requested files. This, however, does not run afoul of *Waller’s* statement that the requesting citizen “must sufficiently identify those documents so that the records custodian can produce and copy those documents *without the requirement of a search by the records custodian.*” *Waller*, 16 S.W.3d at 774 (emphasis added). The search that may be required to ferret out confidential matter in the instant case is not the result of an imprecise description of the requested material. The requested material is very precisely described. Rather, the search, if one becomes necessary, is required because of the respondent’s duty not to produce confidential material and his duty under the Act to specify why he is not producing some portion of the requested material. *See* Tenn. Code Ann. § 10-7-505(b).

V.

In summary, we conclude that the trial court erred in requiring the petitioner to amend his petition to further identify the documents he was requesting. Accordingly, we vacate the trial court’s order granting the respondent’s motion to dismiss. We also vacate the trial court’s judgment denying the petitioner’s motion for summary judgment. This matter is remanded to the trial court for further consideration of the petitioner’s motion and for such other proceedings as may be required regarding such defenses as the respondent may properly present to the trial court for its consideration. Costs on appeal are taxed against the respondent, H. Greeley Wells, Jr.

CHARLES D. SUSANO, JR., JUDGE